LAI MEW SENG

v.

COSMOPAC SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-15-1997]
10 OCTOBER 1997

CONTRACT: *Sale and purchase of property - Booking pro forma - Whether constitutes a binding contract between developer and purchaser - Option agreement - Whether a mere formality - Sale and purchase agreement - Whether a conditional contract - Intention of parties*

CONTRACT: *Specific performance - Sale and purchase of property - Conditions precedent to granting of specific performance - Whether plaintiff ready and willing to perform contract*

The defendant, a licensed housing developer, organised a sales launch of its housing project known as "COSMO CITY" in Singapore. The plaintiff signed a booking proforma with the defendant for the purchase of one unit of shophouse ('the property') and paid 1% of the purchase price as a non-refundable booking fee. An official receipt was issued to the plaintiff on that very day. The lot number of the property was not known but the layout plan showed a row of four storey shophouses.

Pursuant to the terms of the booking proforma, the plaintiff was required within 14 days of notification by the solicitors for the defendant to execute an 'option agreement' and to pay 9% of the purchase price for the property.

The plaintiff claimed that the 'option agreement' necessarily referred to the sale and purchase agreement for the property and that the defendant had failed to prepare the relevant sale and purchase agreement for signing by the plaintiff despite numerous correspondence from the plaintiff. The plaintiff then sought specific performance from the court that the defendant be ordered to sign the sale and purchase agreement with the plaintiff for the property.

Counsel for the plaintiff argued that upon signing the booking proforma, a binding contract for the sale and purchase of the property had came into existence. Hence, the defendant was under an obligation to sell the property to the plaintiff which the plaintiff was entitled to enforce by way of specific performance. Counsel for the defendant, on the other hand, argued that the booking proforma was void for being uncertain.

Held:

[1] It is the duty of the court to determine not only the nature of the booking proforma but also the true intention of the parties at the time the booking proforma was executed, particularly to ascertain whether the parties intended to be bound by the contract immediately, or only upon the fulfilment of certain conditions, like the execution of a formal contract.

[2] Specific performance can only be enforced where a contract is concluded and binding in law. Of crucial importance is that all formalities have been observed and that the parties have agreed, whether expressly or impliedly, to all the essential terms of the contract. The terms too must be precisely certain to enable the court to make an order and effect the exact performance of the contract.

[3] Specific performance will not be granted when the contract is illegal or oppressive. The following impediments will also bar specific performance: (a) where there is non-performance of certain conditions of the contract by the plaintiff; (b) where the plaintiff has committed an act amounting to a repudiation of the contract; (c) where the plaintiff has been guilty of undue delay in performing his part of the bargain under the contract; (d) where the circumstances have changed and made it impossible for the defendant to perform the contract; (e) where the contract has been varied or rescinded; and (f) where to enforce the contract by way of a specific performance will be against public policy.

[4] Of crucial importance and great relevance to the factual matrix of the present case would be the case of *Pakharsingh v. Kishansingh* where it was decided that in a suit for specific performance of a contract for sale, the onus of proving readiness and willingness to perform his part of the contract continuously from the date of the contract until the hearing of the suit lies entirely on the plaintiff. That onus may easily be discharged in the absence of any evidence to the contrary.

[5] Applying the case of *Pakharsingh v. Kishansingh*, the plaintiff had succeeded in showing her readiness and willingness to perform her part in the contract continuously – an unending devotion to the terms of the booking proforma, a valid contract between the parties thereo.

[6] The delay on the defendant's part and the 'benefit' of that delay should not be claimed by the defendant by arguing that the condition precedent to the creation of the legal obligations between the parties had not been satisfied. A delay of this nature could never constitute a bar to the plaintiff from claiming specific performance since the plaintiff had fulfilled her part of the bargain.

[7] As a licensed housing developer, the defendant was governed by the Housing Developers (Control and Licensing) Act 1966 ('the Act') and the Housing Developers (Control and Licensing) Regulations 1989 ('the Regulations') which were made thereunder. The Act and the Regulations are meant to protect purchasers like the plaintiff and must be brought to bear upon the defendant, a developer who went to a neighbouring country to woo purchasers and having so wooed tried to resile from the booking proforma. That was an unethical conduct and an unscrupulous developer.

[8] The booking proforma, couched in the language employed therein, when read together with the pleadings, affidavits and correspondence all pointed to the direction that the booking proforma constituted a binding contract between the plaintiff and the defendant. The execution of the sale and purchase agreement which was cleverly worded as an 'option agreement' was a mere formality. The booking proforma could not be construed to make the contract between the parties a conditional contract.

[Order accordingly.]

Cases referred to:

Ardeshir Mamma v. Flora Sassoon [1928] AIR PC 208 ***(cit)***
Australian Hardwoods Pty Ltd v. Railways Comr [1961] 1 All ER 737 ***(cit)***
Briggs v. Parsloe [1937] 3 All ER 831 ***(cit)***
Campbell v. London & Brighton Rly Co [1846] 5 Hare 519 ***(cit)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 ***(refd)***
Cheng Chuan Development Sdn Bhd v. Ng Ah Hock [1982] 2 MLJ 222 ***(refd)***
Chin Tat v. Siow Shiow & Ors [1971] 1 MLJ 67 ***(refd)***
Chong Choong Hoong & Anor v. Wong Yuen Sang [1976] 1 MLJ 282 ***(refd)***
Clarke v. Moore [1844] 1 Jo & Lat 723 ***(cit)***
Crofton v. Ormsby [1806] 2 Sch & Lef 583 ***(cit)***
Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Another Appeal [1978] 2 MLJ 239 ***(foll)***
Davis Contractors Ltd v. Fareham Urban District Council [1956] AC 696 ***(refd)***
De Waal v. Adler [1886] 12 App Cas 141 ***(cit)***
Dyas v. Rooney [1890] 27 LR Ir 4 ***(cit)***
Gan Realty Sdn Bhd & Ors v. Nicholas & Others [1969] 2 MLJ 110 ***(cit)***
Gee v. Pearse [1848] 2 De G & Sm 325 ***(cit)***
Goldsoll v. Goldman [1915] 1 Ch 292 ***(cit)***
Gregory v. Wilson [1852] 2 Hare 683 ***(cit)***
Hammond v. Allen [1994] 1 All ER 307 ***(cit)***
Hare v. Nicoll [1966] 2 QB 130 ***(cit)***
Hassan v. Ismail [1970] 1 MLJ 210 ***(refd)***
Honeyman v. Marryat [1855] 21 Beav 14 ***(cit)***
Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335 ***(cit)***
Knatchbull v. Grueber [1815] 1 Madd 153 ***(cit)***

Lee Hoy & Anor v. Chen Chi [1971] 1 MLJ 76 ***(cit)***
Levy v. Stogdon [1899] 1 Ch 5 ***(cit)***
Lord Walpole v. Lord Orford [1797] 3 Ves 410 ***(cit)***
Maritime National Fish Ltd v. Ocean Trawlers Ltd [1935] AC 524 ***(cit)***
McMurray v. Spicer [1868] LR 5 Eq 527 ***(cit)***
Measures Bros Ltd v. Measures [1910] 2 Ch 248 ***(cit)***
Modlen v. Snowball [1861] 4 De GF & J 143 ***(cit)***
Mohamed v. Ho Wai [1961] MLJ 7 ***(cit)***
Monro v. Taylor [1852] 3 Mac & G 713 ***(cit)***
Morse v. Merest [1821] 6 Madd 26 ***(cit)***
Newman v. Dorrington Developments Ltd [1975] 3 All ER 928 ***(cit)***
Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company Ltd [1894] AC 535 ***(cit)***
Nunn v. Truscott [1849] 3 De G & Sm 304 ***(cit)***
Ocean Tramp Tankers Corp v. V/O Sovfracht, The Eugenia [1964] 2 QB 226 ***(cit)***
Pakharsingh v. Kishansingh AIR [1974] Raj 112 ***(refd)***
Patel v. Ali [1984] Ch 283 ***(cit)***
Price v. Dyer [1810] 17 Ves 356 ***(cit)***
Re Mahmoud & Ispahani [1912] 2 KB 716 ***(cit)***
Rees v. Marquis of Bute [1916] 2 Ch 64 ***(cit)***
Reeves v. Greenwich Tanning Co Ltd [1864] 2 Hem & M 54 ***(cit)***
Robinson v. Page [1826] 3 Ves 114 ***(cit)***
Rose Hall Ltd v. Reeves [1975] AC 411 ***(cit)***
SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] 2 MLJ 31 ***(refd)***
Shrewsbury & Birmingham Railway Co v. London & North Western Railway Co [1850] 2 Mac & G 324 ***(cit)***
Southcomb v. Bishop of Exeter [1874] 6 Hare 213 ***(cit)***
Sparks v. Liverpool Waterworks Co [1807] 13 Ves 428 ***(cit)***
Sport International Bussum BV v. Inter Footwear Ltd [1984] 1 All ER 376 ***(cit)***
Strong v. Stringer [1889] 61 LT 470 ***(cit)***
Strongman (1945) Ltd v. Sincock [1955] 2 QB 525 ***(refd)***
Sun Building Society v. Western Suburban & Harrow Road Building Society [1921] 2 Ch 438 ***(cit)***
Sykes v. Beadon [1879] 11 Ch D 170 ***(cit)***
Taylor v. Caldwell [1863] 3 B & S 826 ***(cit)***
Upperton v. Nickolson [1871] 6 Ch App 436 ***(cit)***
Verrall v. Great Yarmouth Borough Council [1981] QB 202 ***(cit)***
Wright v. Howard [1823] 1 Sim & St 190 ***(cit)***
Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor [1982] 2 MLJ 92 ***(refd)***

Legislation referred to:
Sale of Goods (Malay States) Ordinance 1957, s. 58
Specific Relief Act 1950, ss. 11, 19, 21

For the plaintiff - Daud Asmoni; M/s Tay & Partners
For the defendant - Chang Tau Sian; M/s Teh Poh Teik & Co

JUDGMENT

Abdul Malik Ishak J:

The defendant, a licensed housing developer organised a sales launch of their housing project known as "COSMO CITY" located at Mukim Plentong, Johor Bahru to woo purchasers. That sales launch was held on 9 January 1991 at the world trade centre hall 3, Republic of Singapore. Brochures, drawings and scale models of the shophouses were displayed. A copy of the drawing to show the development project can readily be seen in exh. "B" of the affidavit of the plaintiff that was affirmed on 10 April 1997 as reflected in encl. 9. The plaintiff became interested and proceeded to sign a booking proforma for the purchase of one unit four storey shophouse on 9 January 1991 upon payment of a cash booking fee which was non-refundable in the sum of RM1,500 which represented a 1% out of the purchase price of RM150,000. On that very day, the defendant issued to the plaintiff official receipt vide number 1452 dated 9 January 1991 (exh. "C" of encl. 9) which was later followed by another official receipt dated 29 May 1991 vide number 0087 (exh. "D" of encl. 9). The fulltext of that booking proforma is reproduced hereinunder:

Property : Shophouse

Block : _____

Type : _____

Floor : _____

Price : _____

per sq.ft.

Cosmopac Sdn Bhd,
Suite 1602, 16th Floor,
Holiday Plaza Tower,
80250 Johor Bahru.

Re: **Booking fees/Cosmo City**

This serves to confirm that I/We Lai Mew Seng, No: 47, Jalan Sentul, Taman Melodies, 80350 Johor Bahru (Tel: 332272) has/have agreed to pay you a non-refundable sum of M$1,500.00 (Cash/Cheque No/Credit Card No ___) being booking fee for the above mentioned property.

I/We agree with you that within fourteen (14) days upon receipt of a written letter from your Solicitor sent to my/our abovestated address, I/We shall call at your Singapore Sales Office i.e. No. 21, Middle Road, #01-00 Hua Bao Building, Singapore 0718 to sign the necessary option document and pay you the balance 9% of (the) price of the property.

Floor layout plans are subject to minor amendments.

Floor Area is subject to final survey and any adjustment in sale price is on per sq. foot basis.

Dated this 9 day of January, 1991.

Signed (Illegible)
...
PURCHASER
(Passport/I/C No: 5376432)

Signed (Illegible)

Witness : ...
TAM THYE YOON
(I/C No: 4899105

We agree to the above

Signed (Illegible)
...
COSMOPAC SDN BHD

The official receipt bearing number 1452 is now reproduced as follows:

OFFICIAL RECEIPT
1452
Date: 9/1/91

COSMOPAC INVESTMENT
PRIVATE LIMITED

No. 21, Middle Road Hua Bao Building
#01-00/#02-00 Singapore 0748.
Tel: 3383822 (8 Lines) Fax: 3372133

Received from LAI MEW SENG the sum of Dollars Malaysian: ONE THOUSAND FIVE HUNDRED ONLY being payment of booking fee : 1 unit "Shophouse"

Cash: Signed (Illegible)

M$1,500.00 ...

Signature

Another official receipt bearing number 0087 is also reproduced for convenience:

COSMOPAC SDN. BHD.
Suite 1602, 16th Floor,
Holiday Plaza,
80250 Johor Bahru
Johor.
Tel: 07-329951/2, 329972/3
Fax: 07-339167

OFFICIAL RECEIPT
NO: 0087

Date : 29/5/91

RECEIVED from LAI MEW SENG the sum of Dollars Malaysian: ONE THOUSAND FIVE HUNDRED ONLY

being payment of booking fee 1 unit shophouse

$1,500.00

Cash/Cheque No. for

Refer to C.1. O/R No. 1452
dated 9/1/91

HASIL 10 CENTS
MALAYSIA

COSMOPAC SDN BHD
Signed (Illegible)
...
Collector
Authorised Signatory

It was deposed by the plaintiff in the affidavit in encl. 9 that according to the booking proforma the defendant was supposed to prepare the sale and purchase agreement and thereafter inform the plaintiff accordingly to enable the sale and purchase agreement to be signed and the balance of the 9% of the purchase price paid thereafter. This was not done nor performed by the defendant. It was deposed that the words "option document" in the booking proforma must necessarily refer to the sale and purchase agreement as intended by the parties thereto. The plaintiff deposed that she merely signed the booking proforma as prepared by the defendant and she expected and believed that the defendant as a developer would do the needful to regularise the sale and purchase transaction. It was deposed that the plaintiff had on numerous occasions wrote and met the defendant to seek confirmation whether the sale and purchase agreement had been prepared and ready to be signed and also to enquire when the development project would begin. An example of that kind of correspondence was exhibited as "E" in encl. 9 and that correspondence was from the plaintiff to the defendant dated 18 May 1995. It was worded in this fashion:

Lai Mew Seng,
6, Jalan Zapin 12,
Taman Skudai Baru,
81300 Skudai,
Johor

THIS COPY FOR
ACKNOWLEDGEMENT

18th May 1995

Cosmopac Sdn Bhd,
Suite 1602, 16th Floor,
Holiday Plaza,
Jalan Dato' Sulaiman,
Taman Century,
80250 Johor Bahru.

Attn: Ms Ong

Dear Sirs,

PROPOSED DEVELOPMENT AT PLENTONG
COSMO CITY – SHOPHOUSE

I write to enquire about the status of the above project as it has been more than 5 years since I have paid a one per cent (1%) booking fee for a unit of shophouse. I am still waiting to sign the Sale & Purchase Agreement.

As so many years have passed, could you let me know how much longer I have to wait before the project commences and to sign the Sale & Purchase Agreement. Kindly advise me as to the progress of the project and when construction work is likely to start.

I look forward to your reply pertaining to my queries.

Thank you.

Yours sincerely,

Signed (Illegible)
...
Lai Mew Seng

Tan 20/5/95

COSMOPAC SDN BHD.
SUITE 1602, 15TH FLOOR,
HOLIDAY PLAZA,
80250 JOHOR BAHRU.
TEL: 07-329951/2, 329972/3.

The defendant replied by letter dated 22 May 1995 and it was worded thus (see exh. "G" of encl. 9):

COSMOPAC SDN. BHD
Suite 1602, 16th Floor, Holiday Plaza,
Jalan Dato Sulaiman,
80250 Johor Bahru, Johor,
West Malaysia.
Tel: 07-3329951/2, 3329972/3
Fax: 07-3339167

May 22, 1995

Lai Mew Seng,
6, Jalan Zapin 12,
Taman Skudai Baru,
81300 Skudai,
Johor.

Dear Madam,

Re: COSMO CITY – SHOPHOUSE

We refer to your letter of the abovementioned subject dated 18th May 1995.

We regret to inform that we are unable yet to give an estimated date as the ownership & management of this Company has been changed with effect from last November.

If you feel that the wait has been too long, perhaps you may wish to cancel the booking and seek refund of the 1% booking fee.

Yours faithfully,
COSMOPAC SDN BHD

Signed (Illegible)
...

Another example of the defendant's reply can readily be seen at exh. "F" of encl. 9 which was dated 11 July 1994:

COSMOPAC SDN. BHD.
Suite 1602, 16th Floor, Holiday Plaza,
Jalan Dato Sulaiman,
80250 Johor Bahru, Johor,
West Malaysia
Tel: 07-3329951/2, 3329972/3
Fax: 07-3339167

July 11, 1994

Mdm Lai Mew Seng,
6, Jalan Zapin 12,
Taman Skudai Baru,
81300 Skudai,
Johor.

Dear Madam,

Re : COSMO CITY – SHOPHOUSE

We refer to your letter of the abovementioned subject dated 29 June 1994.

Please be informed that the Sale & Purchase Agreement for the above property is not available for signing yet, until we have obtained the Advertisement & Sale Permit from the authority concerned for this purpose.

However, we will communicate with you again as soon as the above said agreement is ready for signing.

Yours faithfully,
COSMOPAC SDN BHD

Signed (Illegible)
...

It was the plaintiff's stand that, at all material times, she was able and willing to fulfil her obligations under the booking proforma to tie herself, in contract of course, to the defendant. She had waited since 1991 for the defendant to prepare the sale and purchase agreement but alas, the defendant adopted a lackadaisical attitude and had advanced unreasonable reasons for the delay. On 28 October 1996, the plaintiff through her solicitors Messrs. Tay & Partners gave notice to the defendant that unless the sale and purchase agreement was sent to the plaintiff for execution within fourteen (14) days, legal proceedings for specific performance would be instituted forthwith. That notice was exhibited as exh. "H" of encl. 9 and it was worded as follows:

TAY & PARTNERS
PEGUAMBELA DAN PEGUAMCARA
ADVOCATES & SOLICITORS

SUITE 3A-05/08, 3A FLOOR, HOLIDAY PLAZA,
JALAN DATO SULAIMAN, TAMAN CENTURY,
80250 JOHOR BAHRU, MALAYSIA.
TEL: 07-3316138 FAX: 07-3322898
E-MALL: tnpjb@po, jaring.my

Our Ref: L97/B1(1)NLC/sl
28th October 1996

COSMOPAC SDN BHD, **BY HAND**
Suite 1601, 16th Floor,
Holiday Plaza,
Jalan Dato Sulaiman,
Taman Century,
80250 Johor Bahru.

Dear Sirs,

PURCHASE OF ONE (1) UNIT OF SHOPHOUSE
AT COSMO CITY, MUKIM PLENTONG, JOHOR BAHRU
PURCHASER : LAI MEW SENG
PURCHASE PRICE : RM150,000.00

We act for the abovenamed purchaser of No. 68, Jalan Perak, Taman Coronation, 80200 Johor Bahru.

We are instructed that our client has placed a booking for her purchase of one (1) unit of shophouse with you vide a booking proforma dated 9th January 1991 duly executed by both parties. Our client has also paid to you a booking fee of one per centum (1%) of the purchase price amounting to RM1,500.00 as evidenced by your agent's official receipt no: 1452 dated 9th January 1991 which was later changed to your official receipt no: 0087 dated 29th August 1991 due to your administrative procedure.

We are further instructed that despite requests and demands for the Sale & Purchase Agreement to be sent to our client for her execution, you have failed, refused and/or neglected to do so till to date although our client has always been and is still able, ready and willing to complete the said purchase.

We are now instructed to give **NOTICE** which we hereby do that unless the Sale & Purchase Agreement is sent to us for our client's execution within **FOURTEEN (14)** days hereof, we have strict instructions from our client to institute legal proceedings against you for specific performance, in which event, you shall be liable for all costs and expenses incurred thereto.

Signed: Illegible
COSMOPAC SDN BHD
Suite 1602, 16th Floor,
Holiday Plaza,
Jalan Dato Sulaiman,
80250 Johor Bahru.
Tel: 3329951/2, 3329972/3

Yours faithfully,

Signed (Illegible)
...

c.c. Client.

In response thereto and by letter dated 25 November 1996, the defendant through their solicitors Messrs Kushairi & Co replied in positive averments, in the following tone (see exh. "1" of encl. 9):

KUSHAIRI & CO.
ADVOCATES & SOLICITORS
4B, Jalan 55 2/63, 47300 Petaling Jaya,
Selangor Darul Ehsan.
Tel: 03-7744764 Fax: 03-7745616
(Office Hours: 9 am - 6 pm Monday - Friday)

Kushairi Abdul Karim
Nor Azhani Amran

Assistant:
Najah Dato' Ariffin
Suhaimi

YOUR REF : L97/B1(1) NLC/sl
OUR REF : KC/K/691/96(C)
DATE : 5/11/96

TAY & PARTNERS,
ADVOCATES & SOLICITORS,
SUITE 3A-05/08, 3A FLOOR,
HOLIDAY PLAZA,
JALAN DATO SULAIMAN,
80250 JOHOR BAHRU,
JOHOR DARUL TAKZIM.

Dear Sir,

Re: REPLY TO LETTER OF DEMAND AGAINST COSMOPAC SDN. BHD. INSTITUTED BY LAI MEW SENG

PROJECT : COSMOPAC CITY, MUKIM PLENTONG, JOHOR BAHRU

We act for COSMOPAC SDN. BHD. (176010-V) the developer of the above project against whom your client abovenamed had caused a letter of demand to be issued.

We have our client's instruction to state that they are still in the process of finalising the above development.

We are further instructed to state that it is our client's intent to honour and proceed with the Sale and Purchase Agreement with your client at the price and on the terms reflected in the Sales Proforma.

Yours faithfully,

Signed (Illegible)
...

RECEIVED
27 NOV 1996
TAY & PARTNERS

c.c. COSMOPAC SDN. BHD (176010-V),
SUITE 1602, 16TH FLOOR,
HOLIDAY PLAZA,
JALAN DATO SULAIMAN, 80250 JOHOR BAHRU.

On 28 November 1996, the plaintiff through her solicitors Messrs Tay & Partners wrote a letter addressed to Messrs Kushairi & Co and in that letter the plaintiff expressed her desire to select the lot for the shophouse and sign the sale and purchase agreement within seven (7) days from the date of the letter. There was no response forthcoming from the defendant nor from the defendant's solicitors. The letter dated 28 November 1996 in exh. "J" of encl. 9 was worded thus:

TAY & PARTNERS
PEGUAMBELA DAN PEGUAMCARA
ADVOCATES & SOLICITORS

SUITE 3A-05/08, 3A FLOOR,
HOLIDAY PLAZA, JALAN DATO SULAIMAN,
TAMAN CENTURY, 80250 JOHOR BAHRU,
MALAYSIA.

TEL: 07-3316136 FAX: 07-3322898
E-MAIL: tnpjb@po.jaring.my

Your ref : KC/K/69/96(C)
Our ref : L97/BI(1) NLC/s1
28th November 1996

Kushairi & Co.,
4B, Jalan SS 2/63,
47300 Petaling Jaya.

BY FAX/POST
03-7745616

Dear Sirs,

PURCHASE OF ONE (1) UNIT OF SHOPHOUSE
AT COSMO CITY, MUKIM PLENTONG, JOHOR BAHRU
PURCHASER : LAI MEW SENG
PURCHASE PRICE : RM150,000.00

We refer to your letter dated 25th November 1996. Our client is pleased to note that it is your client's intent "to honour and proceed with the Sale and Purchase Agreement" with our client "at the price and on the terms reflected in the Sales Proforma".

However, our client instructs that she has waited for more than 5 years for your client to proceed on the execution of the Sale and Purchase Agreement and each time an enquiry was made, she was given to understand that it will be forthcoming.

We are instructed by our client that she would like to select the lot for the shophouse and sign the Sale and Purchase Agreement within seven (7) days from date of this letter, failing which she reserves the right to proceed with legal proceedings against your client, in which event please confirm whether you have instructions to accept service of legal processes.

Your reply within seven (7) days hereof is required.

Yours faithfully,

Signed (Illegible)
...

c.c. Client.

The plaintiff deposed that the defendant's statement of defence was totally baseless and unfounded.

The plaintiff referred to para. 4 of the statement of defence in her affidavit in encl. 9. In para. 4 of the statement of defence it was averred that under the booking proforma if the defendant's counsel gave notice to the plaintiff, the latter was required to attend at the office of the defendant to sign the "option document" and pay 9% of the purchase price. The plaintiff denied para. 12 of the statement of defence in her affidavit in encl. 9. In para. 12 of the statement of defence the defendant pleaded that the plaintiff did not incur any damages apart from the sum of RM1,500.

Tan Lay Kit ('L.K. Tan'), the accounts manager of the defendant's company, affirmed an affidavit-in-reply on 27 May 1997 in encl. 12. In that affidavit-in-reply, L.K. Tan referred to the statement of defence and reiterated its contents therein. It was said that there was a valid and meritorious defence

to the plaintiff's claim. It was the defendant's stand as reflected in encl. 12 that the plaintiff was not entitled to specific performance for the following reasons:

(a) the booking proforma did not adequately identify the property which the plaintiff alleged that she had purchased;

(b) the booking proforma did not state the total purchase price of the property which the plaintiff allegedly purchased;

(c) the booking proforma did not put the onus of preparing any sale and purchase agreement on the defendant;

(d) since the defendant's solicitors have not issued any notice whatsoever to the plaintiff to sign the sale and purchase agreement then the condition precedent for any legal obligations between the plaintiff and the defendant has not been satisfied;

(e) the booking proforma spoke of the execution of an "option agreement" and not a sale and purchase agreement;

(f) that the plaintiff was not, at any material time, ready, willing and able to perform her obligations under the booking proforma or any other agreement whatsoever as the plaintiff had not paid nor attempted to pay the alleged balance of the purchase price;

(g) that the essential terms of the sale and purchase agreement were not present in the plaintiff's case; and

(h) that the plaintiff took a long time to institute an action and was thus barred from the remedy of specific performance.

L.K. Tan also denied paras 5, 6, 9, 10 and 14 of the plaintiff's affidavit in encl. 9. It is interesting to note that the defendant admitted paras 3, 4 and 7 of the plaintiff's affidavit in encl. 9.

L.K. Tan's affidavit-in-reply in encl. 12 must be taken with a pinch of salt. It must be read in the context of the statement of claim and the statement of defence cumulatively. The statement of defence agreed with paras. 3 and 4 of the statement of claim. Now, para. 3 of the statement of claim briefly averred, for fear of repetition, that on 9 January 1991, the defendant organised a sales launch at the world trade centre hall 3, Singapore and there on the same date the plaintiff booked by way of a booking proforma one unit of shophouse at the price of RM150,000 after the plaintiff had examined the brochures, drawings and scale models that were exhibited there. Paragraph 4 of the statement of claim averred that the plaintiff had paid the defendant the

booking fee of RM1,500 on 9 January 1991 which represented 1% out of the purchase price of the shophouse. It was further deposed that such payments were supported by the receipts as alluded to in the early part of the judgment.

As can be seen from the long recital of the facts of the case the formal sale and purchase agreement had not been signed between the parties. The defendant though contesting that the words "option document" did not relate to "a sale and purchase agreement", finally agreed that it must necessarily refer to a "sale and purchase agreement" as the defendant through L.K. Tan used the words "sale and purchase agreement" in para. 6(c), para. 6(d) and para. 6(g) of encl. 12 (see the translation in the English language) successively. In paras. 3, 6, 8, and 9 of the statement of defence, the words "sale and purchase agreement" were also employed. It is not out of place to mention that in cases of this nature, the intention of the parties plays a crucial role in determining the effect of the booking proforma. It is the duty of this court to determine not only the nature of the booking proforma but also the true intention of the parties at the time the booking proforma was executed, particularly to ascertain whether the parties intended to be bound by the contract immediately, or only on the fulfillment of certain conditions, like execution of a formal contract. In the words of Gopal Sri Ram JCA in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 CA especially at p. 633, which must surely apply to the factual matrix of the present case:

> An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.
>
> Unless the approach we have stated is adopted, a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loop-hole and commerce would come to a virtual standstill.
>
> The law leans in favour of upholding bargains and not in striking them down willy-nilly.

Taking into account not only the booking proforma but also the pleadings, correspondences between the parties' solicitors together with encls. 9 and 12, the salient facts emerged as follows:

The plaintiff went to the sales launch in Singapore and decided to purchase one unit of four storey shophouse to be built by the defendant at Mukim

Plentong, Johor Bahru. The plaintiff paid a booking fee of RM1,500 being 1% of the price of that four storey shophouse which was RM150,000. The lot number was not known but the layout plan in exh. "B" to encl. 9 showed a row of four storey shophouses. Two receipts of that booking fees were handed to the plaintiff. The defendant was supposed to invite the plaintiff by a written letter to sign the sale and purchase agreement and thereafter the plaintiff to pay the balance of the 9% out of the purchase price of the property in question. The defendant did not do so even though the plaintiff was able and willing to execute the sale and purchase agreement of the property in question. It is not in dispute that the defendant has yet to build that four storey shophouse and the defendant has not disposed of that property to a third party. The plaintiff sought for specific performance particularly the prayers in encl. 10 thereof which are now set out hereinunder:

(a) suatu perintah perlaksanaan spesifik borang tempahan bertarikh 9/1/1991 oleh Defendan di mana Defendan dikehendaki menandatangani Surat Perjanjian JualBeli dengan Plaintif untuk menjual sebuah unit rumah kedai dalam lot yang dipilih oleh Plaintif di "COSMO CITY" Mukim Plentong, Johor Bahru untuk harga RM150,000.00 kepada Plaintif dalam tempoh dua (2) minggu selepas Perintah yang bermeterai diserahkan terhadapnya;

(b) selanjutnya atau secara alternatif, sekiranya perintah perlaksanaan spesifik tidak dibenarkan, gantirugi hendaklah dibayar oleh Defendan seperti ditaksir oleh Penolong Kanan Pendaftar;

(c) kos permohonan ini dibayar oleh Defendan;

(d) lain-lain perintah atau relif yang Mahkamah Yang Mulia ini anggap adalah adil dan suaimanfaat.

Mr. Daud bin Asmoni, the learned counsel for the plaintiff, strenuously argued that upon signing the booking proforma, a binding contract for the sale and purchase of the one unit four storey shophouse came into existence. The defendant was under an obligation to sell that property to the plaintiff and, consequently, the plaintiff was entitled to the specific performance which she sought for. The defendant, it was argued, by specific performance be ordered to sign the sale and purchase agreement of one unit four storey shophouse, to be chosen by the plaintiff, at the selling price of RM150,000. Mr. Chang Tau Sian, the learned counsel for the defendant, argued and gave the reasons as set out in the early part of this judgment to show that the booking proforma was void for being uncertain. In *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck And Another Appeal* [1978] 2 MLJ 239 FC, Suffian LP writing for the then Federal Court observed

In our respectful view the learned judge was quite right.

The issue was whether the booking proforma was a mere agreement to agree, as the defendants contended, or a firm contract of sale of the property, as the plaintiff contended. In our judgment, the proforma was a firm contract. It identified the parties, it specified the property to be bought and its price. True, the plaintiff was required to sign an agreement of sale to be prepared by the developers' solicitors and subject to the terms and conditions therein, but in fact the developers never showed the plaintiff the draft of any agreement.

The proforma in the *Daiman Development's* case was quite different from the proforma in the present case but the principles therein are applicable and should be vigorously applied to the present case. The proforma in the *Daiman Development's* case was worded thus:

DAIMAN DEVELOPMENT SDN. BERHAD
Booking Proforma

Name of intending purchaser Mr. Mathew Lui Chin Teck (NRIC 0690161).

Address Post Office, Kota Tinggi, Johore.

Lot No. Booked (as per Company's layout) 949.
Approximate Basic Area 2,800 sq. ft.
Type of house single-storey Semi-detached.
Purchase price Dollars Twenty Six Thousand only ($26,000.00).

I, the abovenamed Mathew Lui Chin Teck, hereby agree to purchase the above Lot together with the house as specified at the above stated price for which a Booking Fee of $700 is now paid to the Company subject to the following terms and conditions:

1. That within two (2) weeks from the date of receipt of a notice by the Company, sent to my above address, I shall pay to the Company or its Solicitors, M/s A.L. Looi of Rooms 401 & 402, 4th Floor, O.C.B.C. Building, Johore Bahru, Johore the sum of $2,600 and sign the Agreement For Sale with the Company which shall be prepared by the Solicitors and subject to the terms and conditions therein.

2. That I have inspected the Company's layout and building plans and specifications and agree to accept whatever alterations and amendments as may be required by the Authorities. In the event of major alterations and amendments to the layout plan I reserve the right to cancel my booking and the booking fee hereby paid shall be refunded to me by the Company free of interest.

3. That in the event of failure on my part to comply with Clause 1 above after due notice has been given by the Company or its Solicitors, the

Booking will be treated as cancelled and the Booking Fee of $700 shall be forfeited to the Company and I shall have no further claims against the Company.

4. That the area of the Lot above stated is only approximate and in the event that the area thereof differs upon the issue of the Qualified Title in respect of the said Lot, I shall abide to the same and agree to pay $2 per sq. ft. for any excess above the basic and in the event of shortage in the basic area above stated the Company shall refund to me the difference calculated at the rate of $2 per sq. ft.

Dated this 1st day of October, 1972.

Sd. (Illegible)	Sd. (Illegible)
Witness	Signature of intending purchaser

The *Daiman Development's* case went straight up to the Privy Council as reported in [1981] 1 MLJ 56, where Sir Garfield Barwick dismissed the appeal and affirmed the decision of the then Federal Court.

Reference to the headnote would be sufficient for this exercise:

> Held, dismissing the appeal: (1) What might be properly included by the solicitors in the agreement for sale is a question which can be judicially resolved by a court construing the proforma, in the event of any objection by the respondent to any term or condition included by the solicitors in the contract of sale. Thus upon its true construction the proforma did not make either the obligation to purchase or the obligation to sign conditional on the making of some other agreement as to the terms and conditions to be inserted in the contract of sale;
>
> (2) the proforma cannot be construed so as to treat its terms as contractually ineffective until some further agreement had been made by the parties. Nor could it properly be said that the agreement contained in the proforma was inchoate for want of consensual definition of the terms and conditions to be inserted in the contract of sale;
>
> (3) the appellant was clearly bound by the proforma and could not argue that it did not create an obligation to purchase and sell the land.

The crucial issue in *Daiman Development's* case was whether the booking proforma constituted a binding contract. Here the same issue crops up for determination. *Cheng Chuan Development Sdn Bhd v. Ng Ah Hock* [1982] 2 MLJ 222 FC was a case where the parties agreed that the booking proforma constituted a contract between them. The then Federal Court in that case had to consider the issue of "the legal effect which could be given to the acceptance of the refund of the booking fee by the buyer after he had refused

to accept the repudiation of the contract by the seller" and this very issue differentiated it from the present case under scrutiny.

No authority is required for the proposition that specific performance can only be enforced where a contract is concluded and binding in law. Of crucial importance would be the requirement that all proper formalities had been observed and that the parties have agreed, whether expressly or impliedly, in regard to all the essential terms of the contract. The terms too must be precisely certain to enable the court to make an order and effect the exact performance of the contract. These are trite propositions.

On the other end of the scale, specific performance will not be granted when the contract is illegal or oppressive. Perhaps it is appropriate to say that the following impediments would bar specific performance:

(a) where there was non-performance of certain conditions of the contract by the plaintiff;

(b) where the plaintiff has committed an act amounting to a repudiation of the contract;

(c) where the plaintiff has been guilty of undue delay in performing his part of the bargain under the contract;

(d) where the circumstances have changed which made the defendant impossible to perform the contract;

(e) where the contract has been varied or rescinded; and

(f) where to enforce the contract by way of a specific performance would be against public policy.

I will now elaborate by way of a digression the impediments that would prevent specific performance from being granted.

Illegality

An illegal contract will not be enforced by specific performance (*Briggs v. Parsloe* [1937] 3 All ER 831 at 838). The court will not interfere indirectly to enforce an illegal contract by awarding damages or compensation or for that matter ordering the profits to be accounted for among the parties interested (*Sykes v. Beadon* [1879] 11 Ch. D. 170 at 197 per Jessel MR). *Rose Hall Ltd v. Reeves* [1975] AC 411, [1975] 2 WLR 890, PC lays down the proposition that the court, in its discretion, may order specific performance of a contract which was illegal when made but later validated by legislation. The court may even proceed to sever the illegal term from the legal term of

the contract so as to enforce by specific performance that legal term (*Newman v. Dorrington Developments Ltd* [1975] 3 All ER 928, [1975] 1 WLR 1642). Severance of an objectionable part of the covenant can be seen in *Goldsoll v. Goldman* [1915] 1 Ch. 292 CA – a classic example of a severance in a covenant relating to the sale of a business. *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company Ltd* [1894] AC 535 is another example of severance in the context of a covenant on the sale of a business. There the court held that the second part of the covenant, relating to engaging in any business competing with that of the company was void because it went further than was reasonably necessary to protect the business acquired. The court proceeded to sever the second part from the first part as the two were clearly separable promises.

Now, if a contract is illegal by statute, neither party can enforce it. Even the innocence of the plaintiff in *Re Mahmoud & Ispahani* [1912] 2 KB 716 CA did not allow him to recover damages under the illegal contract. Denning LJ however in *Strongman (1945) Ltd v. Sincock* [1955] 2 QB 525 CA differentiated *Re Mahmoud & Ispahani* in these words:

> It is said that, if damages could be recovered, it would be an easy way of getting round the law about illegality. This does not alarm me at all. It is, of course a settled principle that a man cannot recover for the consequences of his own unlawful act, but this has always been confined to cases where the doer of the act knows it to be unlawful or is himself in some way morally culpable. It does not apply when he is an entirely innocent party ... (Counsel for the architect) referred us to the observations of this court in Re Mahmoud & Ispahani [1921] 2 KB 716.
>
> On a consideration of that case it seems to me that the court only decided that no action lay upon the contract for the purchase of goods. They did not decide whether there was an action for fraud or breach of promise or warranty: and I do not think that their observations were intended to express any view on the matter.

Oppression

An element of unfairness must be read into it. Thus, the court will refuse to grant specific performance if the contract is not "equal and fair" (*Lord Walpole v. Lord Orford* [1797] 3 Ves 410 at 420; and *Rees v. Marquis of Bute* [1916] 2 Ch 64). In the beginning the contract may be fair but later circumstances change to make it oppressive to enforce it (*Patel v. Ali* [1984] Ch. 283, [1984] 1 All ER 978).

Non-performance Of Certain Conditions On The Plaintiff's Part

It goes without saying that in enforcing a contract the plaintiff must readily show that he has performed all the conditions precedent and was ever ready and willing to perform all his obligations under the contract which he ought to perform and will be performing in future (*Measures Bros Ltd v. Measures* [1910] 2 Ch. 248 CA; *Australian Hardwoods Pty Ltd v. Railways Comr* [1961] 1 All ER 737, [1961] 1 WLR 425 PC; and *Sport International Bussum BV v. Inter Footwear Ltd* [1984] 1 All ER 376, [1984] 1 WLR 776 CA). It must be pointed out that where a vendor was unable to transfer or reluctant to transfer the whole subject matter of the contract he was said not to be "ready and willing" and, for that very reason, the court refused to grant him specific performance (*Sun Building Society v. Western Suburban and Harrow Road Building Society* [1921] 2 Ch. 438 CA). The non-performance of the plaintiff's obligations must relate only to those terms which are essential and considerable (*Modlen v. Snowball* [1861] 4 De GF & J 143; *Reeves v. Greenwich Tanning Co. Ltd* [1864] 2 Hem & M 54). However, the defendant can never in law rely on the non-performance by the plaintiff when the defendant himself has waived performance (*Strong v. Stringer* [1889] 61 LT 470).

Repudiation Of The Contract By The Plaintiff

The plaintiff who repudiates the contract will definitely not be entitled to specific performance. The plaintiff who contravenes the terms of the contract may be refused specific performance by the court: an example would be the case of a vendor who has agreed to give immediate possession but changes his mind and retakes possession (*Knatchbull v. Grueber* [1815] 1 Madd 153). Another example would be an agreement under a lease where the lessee commits a breach of the agreement by failing to insure or repair: *Nunn v. Truscott* [1849] 3 De G & Sm 304; and *Gregory v. Wilson* [1852] 2 Hare 683.

The Question Of Undue Delay On The Part Of The Plaintiff

Time is always of the essence of the contract. In a unilateral contract the offeree's acceptance must comply with and adhere strictly to the terms of the offer. Thus, in an option to renew a lease or to terminate a lease the offeree must exercise the option punctually so that the offeror knows what to do next (*United Scientific Holdings Ltd v. Burnley Borough Council; Chiltern Court (Baker Street) Residents Ltd v. Burnley Borough Council; Cheapside Land Development Co. Ltd v. Messels Service Co.* [1978] AC 904, [1977] 2 All ER 62 HL). Conversely, in a bilateral contract time is also of the essence (*Honeyman v. Marryat* [1855] 21 Beav 14 which was later affirmed vide

[1857] 6 HL Cas 112). It goes without saying that the intention of the parties can be garnered by looking at the surrounding circumstances of the case or even by perusing through the clauses in the contract (*Hammond v. Allen* [1994] 1 All ER 307). It must be emphasised that if the parties decide to hold time as the essence of the contract, then prima facie the court will have no choice but to construe it likewise. A unique example is found in the case of *Upperton v. Nickolson* [1871] 6 Ch. App 436 where the court there had to consider the issue of time being the essence of the contract. In that case time was specified to be of the essence in the case of the purchaser's obligation, but not of the vendors. The courts too will look at the nature of the contract to determine whether the parties treat time as essential. The following brief recitals would be an eye opener:

(a) time is inferred in a contract in regard to reversionary interests (*Levy v. Stogdon* [1899] 1 Ch. 5 CA).

(b) in a contract for the sale of a piece of land time would always be a crucial factor for commercial expediency and trade (*Wright v. Howard* [1823] 1 Sim & St 190 – involving the mills; and *Dyas v. Rooney* [1890] 27 LR Ir 4 (Ir CA) – where pasture land for stocking was involved).

(c) contracts for purchase of shares which are subject to fluctuations in value (*Hare v. Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285 CA; *Sparks v. Liverpool Waterworks Co* [1807] 13 Ves 428; and *Campbell v. London and Brighton Rly Co.* [1846] 5 Hare 519).

But a caveat must be imposed. In the event time is not fixed, then the obligation must be fulfilled within a reasonable time (*De Waal v. Adler* [1886] 12 App Cas 141, PC).

Impossibility To Perform The Contract

Under this head, the doctrine of frustration appears to be the forerunner. The contract is said to be impossible to be carried forth simply because of the occurrence of an unexpected event which significantly destroys the substratum of the contract. If that happens the contract is discharged and specific performance will not be decreed. In *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696 HL, Lord Reid had this to say:

> Frustration has often been said to depend on adding a term to the contract by implication: for example, Lord Loreburn in *F.A. Tamplin Steamship Co. Ltd v. Anglo – Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, after quoting the language of Lord Blackburn said:

> That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said 'if that happens, of course, it is all over between us'? What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end.

I find great difficulty in accepting this as the correct approach because it seems to me hard to account for certain decisions of this House in this way ...

I may be allowed to note an example of the artificiality of the theory of an implied term given by Lord Sands in *James Scott and Sons Ltd v. Del Sel* [1922] SC 592:

> A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract.

I think that there is much force in Lord Wright's criticism in *Denny, Mott & Dickson Ltd v. James B. Fraser & Co Ltd* [1944] AC 265:

> The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said: 'Well, if that happens, all is over between us.' On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations.

It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made ...

In *Taylor v. Caldwell* [1863] 3 B & S 826, 122 ER 309 at p. 413 it was a contract for the hire of both the Hall and Gardens. Only the Hall was destroyed but the court held that the contract was frustrated. The essence of frustration is that the extraneous event is outside the control of the parties, not caused by one of them (*Maritime National Fish Ltd v. Ocean Trawlers Ltd* [1935] AC 524 PC). It is germane to mention that if the contract contains a force majeure clause then that clause will generally govern the matter. A pertinent question to ask would be this:

What is the position where an event is foreseen by the parties, or ought to be have been foreseen, but somehow the parties did not make provision for it?

Now, the basis of frustration is this. The event is unexpected, so that if the parties foresaw it they must be taken to have accepted the risk of it occurring if they do not make express provision to deal with it. But the difficulty is this – it is difficult to decide whether an event is sufficiently predictable to be 'foreseeable'? (*Ocean Tramp Tankers Corporation v. V/O Sovfracht, The Eugenia* [1964] 2 QB 226 (CA)).

What are the effects of frustration? In law frustration discharges the contractual performance from the date of frustration so that the parties are excused from future performance.

Rescission

Rescission would be apparent when the following factors appear:

(1) mistake;

(2) duress;

(3) fraud;

(4) undue influence; and

(5) misrepresentation

In these situations, the contract will be void, or is voidable and can be avoided, and consequently there can never be any question of specific performance.

A variation is certainly different from rescission. A written contract can never be varied by an oral evidence in a court of law. And if a contract is in writing, then oral evidence of an agreement to vary some of its terms cannot be admitted at all (*Price v. Dyer* [1810] 17 Ves 356; and *Robinson v. Page* [1826] 3 Ves 114).

Public Policy

This is an unruly horse. It extends and covers a lot of ground. Suffice for this exercise to say that specific performance may be refused where, for instance, there is a risk of public disorder if a contract to grant a licence to use a public building were to be enforced as envisaged in *Verrall v. Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839 CA.

Having gone on a long excursion, it is now instructive to ask a pertinent question. It is this. Is this booking proforma in the present case infected by these impediments? The answer is in the negative. In my judgment, there is no impediment for the contract between the plaintiff and the defendant to proceed. The plaintiff was ever willing and ready to perform her obligations in the future. She has performed her part under the contract. The Malaysian Courts have on numerous occasions ordered specific performance in cases of land transactions which are subject to a condition precedent to be fulfilled by the vendor. In *Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor* [1982] 2 MLJ 92 PC, the respondents there claimed for specific performance of a contract for the sale of land against the appellant. The learned trial judge found in favour of the respondents and also found that there was an oral agreement enabling the respondents to pay damages for the breach. The trial judge then gave judgment to the respondents. The respondents appealed to the then Federal Court seeking specific performance of the contract and the Federal Court held that the respondents were entitled to specific performance. The appellant appealed to the Privy Council.

The Privy Council dismissing the appeal held that the fact that there was an alternative claim for damages in an action by the purchaser for specific performance of a contract for the sale of land could not be a fact relevant to the exercise of the discretion by the learned judge and the then Federal Court was right in exercising its discretion and was correct when it reversed the decision of the learned judge and ordered specific performance.

In *Chong Choong Hoong & Anor v. Wong Yuen Sang* [1976] 1 MLJ 282, the court there had occasion to allow the purchaser's application for specific performance with costs even though the vendor failed to obtain the prior consent of the Ruler in Council, which consent the purchasers themselves had already obtained. In *Hassan v. Ismail* [1970] 1 MLJ 210, the court there ordered specific performance of an agreement for sale of land subject to subdivision which required the vendor to submit an application for subdivision to the land office.

In *Chin Tat v. Siow Shiow & Ors* [1971] 1 MLJ 67, before the Collector the vendor was unable to obtain permission to transfer the land and the court intervened by granting specific performance of the agreement for sale and the vendor was ordered to obtain the permission of the Collector.

Of crucial importance and of great relevance to the factual matrix of the present case is the case of *Pakharsingh v. Kishansingh* AIR [1974] Raj 112. That case decided that in a suit for specific performance of a contract for sale, the onus of proving readiness and willingness to perform his part of the

contract continuously from the date of the contract till the hearing of the suit lies entirely on the plaintiff. That case also decided that onus way easily be discharged in the absence of any evidence to the contrary. In my judgment, the principles of law enunciated in *Pakharsingh* should be vigorously applied to the present case and when so applied the plaintiff succeeded to show her readiness and willingness to perform her part in the contract continuously – an unending devotion to the terms of the booking proforma, a valid contract between the parties thereto.

In must not be forgotten that in the booking proforma the defendant's solicitor was supposed to invite the plaintiff to sign the sale and purchase agreement and upon receipt of the same the plaintiff within 14 days thereof to proceed to the office of the defendant and sign that sale and purchase agreement and pay the balance of 9% of the purchase price. That invitation from the defendant's solicitor never materialised. That was a delay on the defendant's part and the benefit of that delay should not be claimed by the defendant by arguing that the condition precedent to the creation of the legal obligations between the parties had not been satisfied. The delay of this nature can never constitute a bar to the plaintiff to claim specific performance since the plaintiff has fulfilled her part of the bargain. By way of an analogy references may be made to *Crofton v. Ormsby* [1806] 2 Sch & Lef 583 at 603; and *Clarke v. Moore* [1844] 1 Jo & Lat 723 where the tenants there were in possession under an agreement and the delay was said not to be a bar to claiming specific performance of the agreement to accept the lease. Even if the delay was due to negotiations between the parties on the question in dispute, it would not bar a claim for specific performance by the plaintiff (*Southcomb v. Bishop of Exeter* [1874] 6 Hare 213; *Gee v. Pearse* [1848] 2 De G & Sm 325; and *McMurray v. Spicer* [1868] LR 5 Eq 527). It follows therefore that the benefit of the delay can never be claimed by the party causing and responsible for that delay. A striking example would be the case where the delay has been caused by the improper objection which the party responsible has taken (*Morse v. Merest* [1821] 6 Madd 26; *Shrewsbury and Birmingham Railway Co v. London and North Western Railway Co etc* [1850] 2 Mac & G 324; and *Monro v. Taylor* [1852] 3 Mac & G 713). Section 21 of the Specific Relief Act 1950 (Act 137) (Revised 1974) ("Specific Relief Act") gives the court the discretion to decree specific performance. Section 11 of the Specific Relief Act enacts that specific performance may be granted in respect of agreements relating to land transactions where there is a presumption that the breach of a contract to transfer immovable property cannot be adequately relieved by monetary compensation *(Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor (supra))*. Specific performance too has been decreed in respect of an executory contract as envisaged in *Mohamed v. Ho Wai* [1961] MLJ 7. Again

specific performance was granted in a case where the actual damage cannot be ascertained as exemplified in *Gan Realty Sdn Bhd & Ors v. Nicholas & Others* [1969] 2 MLJ 110. Incidentally, it is instructive to note that under s. 58 the Sale of Goods (Malay States) Ordinance 1957 the court has the full discretion on an application by the plaintiff to decree specific performance in any suit for breach of contract to deliver specific or ascertained goods. Of crucial importance to the plaintiff is the proposition expounded by the Privy Council in *Ardeshir Mamma v. Flora Sassoon* [1928] AIR PC 208 to the effect that the court can only grant compensation under s. 18 of the Specific Relief Act where specific performance has been pleaded. Enclosure 10 prayer (a) as set out in the early part of this judgment is reflective of the plaintiff's stand where she pleaded and sought for specific performance. Perhaps it is a consolation to know that *Lee Hoy & Anor v. Chen Chi* [1971] 1 MLJ 76 relied on the Privy Council's decision in *Ardeshir Mamma v. Flora Sassoon*. Finally, it is appropriate to say that under s. 19 of the Specific Relief Act, liquidation of damages is not a bar to specific performance *(Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor (supra))*.

As a licensed housing developer, the defendant is governed by the Housing Developers (Control and Licensing) Act 1966 (Act 118) (Revised 1973) ("Act") and the Regulations made thereunder. Thus, the defendant too would be governed by the Housing Developers (Control And Licensing) Regulations 1989 ("Regulations"). It is obvious that the Act and the Regulations are meant to protect purchasers, like the present plaintiff here. It is apt to quote a passage from that eminent judge, Suffian LP in *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31. This was what his Lordship Suffian LP said at p. 34 of the report:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.

The Act and the Regulations made thereunder must be brought to bear upon the defendant – a developer who went to a neighbouring country to woo purchasers and having wooed, at least the plaintiff, tried to resile against the booking proforma. That was an unethical conduct and to quote George J in *Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 – "an unscrupulous developer."

In my judgment, the booking proforma in the present case couched in the language employed therein when read together with the pleadings, the affidavits and the correspondences exhibited thereto and when applying it to the Act and having the benefit of *Daiman Development's* case – all point to one direction only. That direction would be that the booking proforma constituted a binding contract between the aggrieved plaintiff and the recalcitrant defendant. The execution of the sale and purchase agreement which was cleverly worded as an "option agreement" in order to cloud the issue, was but a mere formality. The booking proforma cannot by any stretch of the imagination, be construed to make the contract between the parties a conditional contract. The conclusion was obvious. The recalcitrant defendant must face the wrath of the law. For these reasons, I granted encl. 10 particularly prayers (a) and (c) forthwith.

Reported by Ling Hea Hoon